INTERIOR BOARD OF INDIAN APPEALS

In the Matter of the Will of Anna Pitts

55 IBIA 121 (06/20/2012)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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IN THE MATTER OF THE WILL OF ANNA PITTS	)	Order Affirming Decision
	)	
	)	Docket No. IBIA 10-081
	)	
	)	June 20, 2012

The Board of Indian Appeals (Board) affirms the February 10, 2010, decision of the Superintendent of the Osage Agency (Superintendent), Bureau of Indian Affairs (BIA), in which she approved the last known will of Anna Pitts (Decedent), deceased Osage. Decedent died in 2008 possessing an Osage headright interest.[1] Two of Decedent's biological relatives, Laura Lou Pitts (Laura) and Olivia Bristow (Olivia) (collectively, Appellants), appealed the Superintendent's approval to the Board, claiming that the will was the product of undue influence. Appellants argue that a confidential relationship existed that gave rise to a presumption of undue influence that the will proponents failed to rebut. Appellants also assert that, even in the absence of the presumption, they have proven that Decedent's 1996 will was the product of undue influence.

The Board concludes that the presumption does not apply because Appellants have not established that a confidential relationship existed, much less have they shown that a party in confidence participated in the will drafting. Nor have Appellants established the elements of undue influence. Therefore, they have failed to present any evidence to support a finding of undue influence.

Background

I. Factual Background

Decedent was born in or about 1911 or 1912. Decedent's biological parents died when she was young, and she and her sister were taken in by their paternal uncle, George Pitts, and his family. Soon after, another Osage couple, Fred Penn and Edith Patterson Penn (Edith), removed Decedent and her sister from the Pitts house and raised them in

[1] *See Smith v. Muskogee Area Director*, 16 IBIA 153, 157-58 (1988), for a discussion of Osage headright interests.

their own home. Aside from Decedent and her sister, Edith and Fred Penn also had at least two biological children and they raised another child, Lucille Agliano. The Penn household eventually moved to Arizona, where Decedent lived until her death.

Decedent kept occasional contact with her biological relatives via mail, telephone, and trips to Oklahoma. Appellants assert that Decedent's visits with her biological relatives in Oklahoma were usually brief and that she was always accompanied by members of the Penn-Kelton family.[2] Laura, a biological first cousin of Decedent, visited Decedent once in Arizona in 1973. Laura last remembers seeing Decedent some time in the 1980s when Decedent "c[a]me to the dances and we said hello and that's it." Hearing Transcript (Tr.), 59:14-16. Laura explained that Decedent would come to Oklahoma to visit Laura's sister, "[a]nd so, I never attempted to contact [Decedent]." Tr., 56:19-57:1. Olivia apparently last saw Decedent in the 1950s. Tr., 44:14-17, 53:23-24, 61:22-23 (Olivia last saw Decedent with Edith; Edith died in 1955 or 1956).

Decedent was very close with the Penn-Kelton family and was treated as a member of the family, although she was never adopted by them. Laura conceded that Decedent was especially close with the youngest family members, Josette and David. *See* Tr., 59:23-25. Decedent apparently lived alone or with David until 2006 or 2007, when she moved to a nursing home. Tr., 28:4-11, 29:11-20. She never married and did not bear or adopt any children.

Attorney John Heskett (Heskett) drafted Decedent's 1996 will, Tr. at 5:22-6:15, which superseded an earlier will and codicil that were also drafted by Heskett's office and which contained terms similar to the 1996 will, Tr. at 7:3-8:2, 10:7-10.[3] Heskett testified that Decedent "knew exactly what she wanted," she asserted strong opinions about how she wanted to dispose of her property, she had testamentary capacity, and she was free of undue

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[2] The "Penn-Kelton family" refers to the descendants of Edith and Fred Penn, including Dorothy Penn Kelton (Dorothy), Barbara Kelton Wicksham, Carolyn Kelton Liff (Carolyn), David Kelton (David), and Josette Kelton Cissell (Josette).

[3] Under the terms of Decedent's 1996 will, David and Josette each inherit one third of Decedent's headright interest. A life estate in the remaining one-third interest is reposed in Carolyn and, upon her death, this interest is to be divided equally between David and Josette. All other trust real property owned by Decedent, if any, passes to David pursuant to the will's residuary clause, as do any funds that Decedent had or was entitled to have in her Individual Indian Money account on the date of her death, after the payment of specific bequests in the will.

influence when she met with Heskett to draft the will. Tr., 7:8-11:8. He noted that no one aside from Decedent and employees of the law office were present when Decedent discussed and signed the will. Tr., 9:2-16, 11:14-12:5. Heskett served as a will witness along with Debra Crain (Crain), an employee of the law office. Crain also testified about the execution of the 1996 will and corroborated Heskett's statements. Tr., 15:21-18:13.

Laura opined that the Penn-Kelton family "exerted some kind of influence" over Decedent, Tr. at 56:8-11, but at the time Decedent executed the 1996 will, Laura had not seen Decedent in at least 7 years. Olivia agreed that the Penn-Kelton family "exerted pressure" on Decedent, but her opinion was based on encounters at least 40 years prior to the will drafting. Tr., 40:7-12. Carolyn testified that Decedent was strong-willed, had testamentary capacity at the time the 1996 will was drafted, and maintained her mental faculties until her death in 2008. Tr., 25:8-26:19.

In 2008, Josette petitioned BIA for approval of the will. Appellants objected to the will on the grounds that the beneficiaries were not biologically related to Decedent, that Decedent did not have testamentary capacity, and that Decedent was acting under coercion, undue influence, and duress when she executed the will. Pursuant to 25 C.F.R. Part 17, a hearing to determine the will's validity was held in Oklahoma on June 26, 2008.

Based on testimony taken at the hearing, the Special Attorney[4] found no evidence of undue influence and determined that the will had been executed in accordance with Oklahoma law; he recommended that the Superintendent approve the 1996 will. *See* Memorandum from Special Attorney to Superintendent, Dec. 24, 2009. On February 10, 2010, the Superintendent adopted the Special Attorney's recommendation and approved the will. Order Approving Will.

Appellants appealed the approval, and submitted an opening brief that argued that the will was the product of undue influence. Josette filed an answer brief in support of the will. Appellants did not file a reply. The Special Attorney and the Superintendent, represented by counsel, elected "to stand on the Administrative Record and allow the appeal to be decided on the briefs of the real parties in interest." Statement on Behalf of the Superintendent and Special Attorney, May 19, 2010.

II. Osage Will Approval

All wills executed by Osage Indians that dispose of Osage headright interests or other trust or restricted property must be approved by the Osage Agency Superintendent

[4] Hearings to determine the validity of Osage wills are held before a "Special Attorney" designated for that purpose. *See* 25 C.F.R. §§ 17.1(d), 17.3(a).

before the wills may be probated in state court. Act of Apr. 18, 1912 (1912 Act), ch. 83, § 8, 37 Stat. 86, 88, *as amended by* Act of Oct. 21, 1978 (1978 Act), Pub. L. No. 95-496, § 5(a), 92 Stat. 1660, 1661 *and* Act of Oct. 30, 1984 (1984 Act), Pub. L. No. 98-605, § 3(b), 98 Stat. 3163, 3166-67; *see also* 25 C.F.R. Part 17. Such wills must be "executed in accordance with the laws of the State of Oklahoma." 1912 Act, § 8, *as amended*. The Superintendent makes each approval decision based on evidence adduced at a hearing on the will's validity. *Id.*; *see also* 25 C.F.R. Part 17. The Superintendent's approval decisions are then appealable to the Board. *See* 212 DM § 13.4(A)(3) (June 1, 2012) (delegating the Secretary of the Interior's review authority for Osage will determinations to the Board); *see also* 25 C.F.R. § 17.14 (Secretary of the Interior's review authority for Osage wills). Once the Superintendent's approval of an Osage will becomes final, it may be submitted for probate in the appropriate Oklahoma state court. 1912 Act, § 3, *as amended by* 1978 Act, § 5(b) *and* 1984 Act, § 3(a).

Discussion

Appellants first argue that the will proponent failed to prove that the will was Decedent's "free and voluntary act." We hold that the will proponent met that burden. Appellants also contend that Decedent's will was the product of undue influence. We disagree. Appellants have failed to show either that a presumption of undue influence arose or that Decedent was otherwise unduly influenced in drafting her will.

We review questions of law and the sufficiency of the evidence *de novo*. *In re the Will of Louis Claremore Walker*, 54 IBIA 95, 102 (2011). Appellants bear the burden of showing error in the Superintendent's decision and we will affirm the Superintendent's decision if it is supported by the evidence. *See id.*

As an initial matter, Appellants have alleged that the will proponent failed to meet her burden of showing that the will was a "free and voluntary act." Opening Brief (Br.) at 3-4. Will proponents bear this burden under Oklahoma law. *See In re Free's Estate*, 75 P.2d 476, 478 (1937). However, Crain's and Heskett's testimony at the hearing made clear that Decedent was strong-willed, knew what she wanted, and did not appear to be unduly influenced, coerced, or otherwise lacking in testamentary capacity. *See* Tr., 7:8-11:8, 9:2-16, 11:14-12:5, 15:21-18:13; *see also* Tr., 25:8-26:19 (Carolyn testified that Decedent was strong-willed).[5] Based on the evidence adduced at the hearing and in the record, we

[5] This testimony is also consistent with Crain's and Heskett's will attestations, which expressly state that the will was executed as Decedent's free and voluntary act. *See* Will at 4-5.

hold that the proponent's burden of showing that the will was a "free and voluntary act" was met.

Appellants then argue that a presumption of undue influence arose under Oklahoma law, and that the will proponents failed to rebut the presumption. Under Oklahoma law, the presumption arises when a person is in a "confidential relationship" with a testator and that person actively assists in the preparation of the testator's will. *In the Matter of the Will and Codicils of Alva F. Bowline*, 33 IBIA 321, 323 (1999), *aff'd. sub nom. Bowline v. United States*, No. 99-CV-0487-H (M) (N.D. Okla. Apr. 20, 2000). In non-Osage will cases, the Board has held that a third element must also be shown: The party in the confidential relationship must be the principal beneficiary under the will. *Id*.[6] Confidential relationships ordinarily arise when one party has control over another party's finances, e.g., through a power of attorney or legal guardianship. *Estate of Theresa Underwood Dick*, 50 IBIA 279, 301 (2009). But confidential relationships are not exclusive to such fiduciary relationships and the Board may also look to the totality of the circumstances to determine whether a confidential relationship exists. *Id.* at 301-02. Oklahoma uses a similar definition of "confidential relationship." *See In re Estate of Holcomb*, 63 P.3d 9, 17 & n.24 (2002).[7]

Where the facts show that a confidential relationship exists and that the party in the confidential relationship actively assisted in the preparation of the will (and, in Board cases not involving Osage wills, was the principle beneficiary under the will, *see* note 6 *supra*), it is presumed that the will was the product of undue influence. *Estate of Ernestine Lois Ray*,

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[6] The Board has recognized that its application of the presumption of undue influence requires a stricter test than Oklahoma law. *See Will of Bowline*, 33 IBIA at 323. The Board has not yet reached the question of whether Oklahoma law or Federal law is appropriate to apply in Osage will cases, and we need not do so now.

[7] The Supreme Court of Oklahoma has broadly defined "confidential relationship":

> "Confidential relation" is not confined to any specific association of parties. It appears when the circumstances make it certain the parties do not deal on equal terms, but on the one side there is an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed; in both[,] an unfair advantage is possible. Where one is bound to act for the benefit of another, he can take no advantage to himself. No precise language can define the limits of the relation; it generally exists between trustee and [beneficiary], guardian and ward, attorney and client, and principal and agent.

In re Estate of Beal, 769 P.2d 150, 155 (1989) (quoting *In re Null's Estate*, 153 A. 137, 139 (1930)).

33 IBIA 92, 96 (1998), and cases cited therein; *In re Estate of Maheras*, 897 P.2d 268, 273 (1995). The burden then shifts to the will proponent to prove the absence of undue influence. *See Estate of Ray*, 33 IBIA at 196; *Estate of Maheras*, 63 P.2d at 273. However, the initial burden of showing the existence of a confidential relationship rests with the will contestant. *Estate of Holcomb*, 63 P.3d at 16-17; *see also Estate of Dick*, 50 IBIA at 300-301 (burden of proof shifts from contestant to proponent only after presumption of undue influence is established).

Appellants insist that a confidential relationship existed between Decedent and the Penn-Kelton family because (1) Decedent was removed from her birth family when she was 5 years old and was then moved to Arizona with the Penns; (2) Decedent believed that Edith was her mother and that the Penn-Keltons were her family; (3) Decedent resided with David for a period of time; (4) Decedent was "at an advanced age" when she executed her will, and (5) when Decedent traveled to Oklahoma and visited with her biological family, she was always accompanied by members of the Penn-Kelton family. Opening Br. at 5-6.

None of the testimony given by Laura or Olivia supports the existence of a confidential relationship, or even relates to the time period when Decedent drafted and executed her will. The evidence shows that Decedent had a close, affectionate relationship with the Penn-Kelton family, but Appellants do not make any allegations concerning a relationship with an individual family member that could be construed as a confidential relationship. Moreover, there is no evidence that any member of the Penn-Kelton family actively participated in the preparation of Decedent's will, which would also be required before the presumption of undue influence could arise. Therefore, we conclude that no presumption of undue influence arose.

Nor have Appellants established that Decedent was otherwise unduly influenced in making her 1996 will. To establish undue influence in the making of an Osage will, a will contestant must show that (1) the decedent was susceptible to being dominated; (2) that the person charged with dominating the decedent could control the decedent's mind and actions; (3) that decedent was thereby induced or coerced into making a will not of her true desire; and (4) that the influence did produce a will that was counter to the decedent's true desire. *See Will of Bowline*, 33 IBIA at 323. There simply is no evidence in the record that demonstrates that Decedent was subjected to undue influence. That is, there is no evidence that Decedent was susceptible to being dominated by others, there is no evidence that Decedent desired to make a different distribution of her property, and there is no evidence that *any* person exerted *any* influence over Decedent, let alone influence that caused Decedent to bequeath her property differently than she actually desired. Appellants have therefore failed to prove undue influence in the making of Decedent's 1996 will, by either

operation of the presumption or by the prima facie elements. As such, Appellants have shown no error in the Superintendent's February 10, 2010 decision.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 212 DM § 13.4(A)(3) (June 1, 2012), we affirm the Superintendent's February 10, 2010, Order Approving Will.

I concur:

// original signed	// original signed
Debora G. Luther	Steven K. Linscheid
Administrative Judge	Chief Administrative Judge